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**February 28, 2008**

**OFFICE OF HEARINGS AND APPEALS**

**Hearing Officer's Decision**

Name of Case: Personnel Security Hearing

Date of Filing: August 17, 2007

Case Number: TSO-0527

This Decision concerns the continued eligibility of XXXXXXXXXX (hereinafter referred to as "the individual") to hold an access authorization (or "security clearance") under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As set forth below, it is my decision, based on the evidence and testimony presented in this proceeding, that the individual's access authorization should not be restored at this time.

**I. Background**

The individual was employed by a DOE contractor and held a security clearance at the contractor's request. In May 2006, the contractor employees went on strike. In October 2006, when the strike ended, the contractor began to recall its employees over a period of a few months. In January 2007, the individual was recalled and, like other returning strikers, had to first take a drug test. His test results were positive for marijuana. In order to resolve the security concern arising from the positive drug test results, the local security office (LSO) conducted a Personnel Security Interview (PSI) with the individual on March 14, 2007. The PSI did not resolve the concerns and, in July 2007, the LSO sent the individual a letter notifying him that his clearance was suspended and informing him how to proceed to resolve the derogatory information that had created a doubt regarding his continued eligibility for access authorization. Notification Letter (July 18, 2007). The Notification Letter stated that the derogatory information regarding the individual falls within the purview of 10 C.F.R. § 710.8 (k) (Criterion K). The LSO invoked Criterion K on the basis of information that the individual has trafficked in, sold, transferred, possessed, used or experimented with a drug or other controlled substance except as prescribed or administered by a physician or otherwise authorized by Federal law. This derogatory information consists of the individual's positive drug test results in February 2007 while he held a DOE access authorization and his violation of a drug certification signed in May 2001.

In a letter to DOE Personnel Security, the individual exercised his right under Part 710 to request a hearing in this matter. 10 C.F.R. § 710.21(b). The Director of OHA appointed me as Hearing Officer in this case. After conferring with the individual and the appointed

DOE counsel, 10 C.F.R. § 710.24, I set a hearing date. At the hearing, the LSO called no witnesses. The individual testified on his own behalf and also elected to call his company physician and his fiancée as witnesses. The transcript taken at the hearing shall be hereinafter cited as “Tr.” Four documents that were submitted by the DOE counsel during this proceeding constitute exhibits to the hearing transcript and shall be cited as “Ex.” Two documents submitted by the individual are cited as “Ind. Ex.”

## **II. Analysis**

The applicable regulations state that “[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable or unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest.” 10 C.F.R. § 710.7(a). Although it is impossible to predict with absolute certainty an individual’s future behavior, as the Hearing Officer I am directed to make a predictive assessment. There is a strong presumption against the granting or restoring of a security clearance. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) (“clearly consistent with the national interest” standard for the granting of security clearances indicates “that security determinations should err, if they must, on the side of denials”); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

I have thoroughly considered the record of this proceeding, including the submissions of the parties, the evidence presented and the testimony of the witnesses at the hearing convened in this matter. In resolving the question of the individual’s eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c): the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the voluntariness of the participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuance or recurrence; and other relevant and material factors. After due deliberation, it is my decision that the individual’s access authorization should not be restored at this time because I cannot conclude that such a restoration would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this determination are discussed below.

### **A. Findings of Fact**

In May 2001, the individual was hired by a DOE contractor. The contractor requested a security clearance for the individual. During a PSI, the individual stated that he had no intention of using drugs in the future and also signed a drug certification memorializing his commitment. Notification Letter at 2; Ex. 1 (PSI) at 12-13; Ex. 4. After the PSI, the individual was granted a clearance in 2001. PSI at 10. He was tested for drugs three or four times over the next five years, and all of the test results were negative. PSI at 11.

In May 2006, the individual's union went on strike. In August 2006, the individual took another job because he was feeling financial pressure due to the length of the strike. PSI at 19. Negotiations between the union and the contractor were eventually successful and in October 2006, the strike ended. The contractor began to recall some of the strikers. In January 2007, the individual was laid off from his second job. PSI at 18-19. At that time, it had been nine months since the individual went on strike, and he believed that he would not be recalled. PSI at 9. In the first couple of weeks of January 2007, the individual was visiting friends and watching sports with them. PSI at 7, 9. They offered him marijuana, and he smoked with them. He used marijuana approximately five times over the first two weeks of January 2007.

In late January 2007, the contractor recalled the individual to work. The contractor administered a pre-return drug test, and the individual's results were positive for marijuana. He got the results of the test in early February 2007. Ex. 1 (PSI) at 6. The contractor put the individual on suspended status. On February 21, 2007, a licensed clinical psychologist hired by the contractor evaluated the individual. See Ind. Ex. 1. The psychologist described the individual as open and honest, and concluded that the individual had "no significant substance abuse or addiction issues." *Id.* He found that the incident was "at most . . . a case of bad judgment and ignorance" and concluded that the individual did not require any substance abuse treatment or intervention. *Id.* The individual entered a counseling program at his facility consisting of six weekly half-hour sessions with the contractor physician ("company doctor"). PSI at 21-24. The company doctor concluded that the individual's chance of relapse is negligible. Tr. at 52. At the PSI in March 2007, the individual signed a security acknowledgment which states that he understands that his use of illegal drugs could result in the loss of his security clearance. Ind. Ex. 3

## **B. DOE's Security Concerns**

Criterion K describes a security concern relating to the use, possession or sale of illegal drugs by the individual. The individual has admitted smoking marijuana in January 2007. Illegal drug use may cause an individual to act in a manner that is inconsistent with the best interests of national security while under the influence of such substances. See Attachment to Memorandum from Assistant to the President for National Security Affairs, "Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information," at ¶ 24 (December 29, 2005) (Revised Adjudicative Guidelines). Also, illegal drug use indicates a willingness to ignore the law that could be reflected in the clearance holder's attitude toward security requirements. See, e.g., *Personnel Security Hearing*, OHA Case No. VSO-0448, 28 DOE ¶ 82,816 (2001); *Personnel Security Hearing*, OHA Case No. VSO-0350, 28 DOE ¶ 82,756 (2000). The individual's positive drug test and his admission of marijuana use are well documented in the record, and validate the charge under Criterion K. See Revised Adjudicative Guidelines at ¶ 15, 18.

## **C. Hearing Testimony**

### **1. The Company Doctor**

The individual introduced the testimony of the company doctor who treated the individual from January through March 2007. Tr. at 40. The physician has been the company doctor for 14 years. He serves as the medical review officer whose job is to implement drug testing, and receive and interpret the results of employee drug tests. He then makes a referral to an initial screening program and determines the type of treatment that should be provided for the employee. *Id.* at 43.

According to the doctor, because of the length of the strike, all employees that were recalled to full employment status were treated like new employees and given pre-employment drug screening. *Id.* at 44-45. If a recalled employee is in “return to work” status and has positive drug results, the contractor offers the employee the option of a “last chance” treatment program, along with follow-up. The doctor reviews the individual’s treatment plan and makes sure that the individual has been compliant with the requirements of the treatment program, and then informs the contractor that the individual has fulfilled the treatment requirement. He has taken extra training in substance abuse and substance abuse disorders. *Id.* at 46.

The doctor referred the individual to a psychologist who provides the contractor with screening evaluations of employees who test positive for drugs. *Id.* at 47. The contractor is confident that this psychologist performs credible evaluations. The doctor called the psychologist and they discussed the psychologist’s evaluation of the individual in February 2007. The psychologist told the doctor that the individual had made errors in judgment but did not have an ongoing substance problem and would not benefit from a structured rehabilitation program. He did tell the doctor that the individual had smoked marijuana once at the age of 18 or 19, and for that reason the doctor had some concern. After the psychological evaluation, the doctor met with the individual to discuss the evaluation. The two then agreed to meet once a week for a few weeks for discussions and to read literature about substance abuse. The doctor testified that he and the individual discussed the effects of drug use on people and on the workplace, that the individual also did his own research into the subject and that he considered the individual to be “genuine.” *Id.* at 50. They had six thirty-minute sessions and the individual took a drug test on March 30, 2007. The results of that test were negative. *Id.* at 56-57. The doctor concluded that the individual has learned from the experience and that the possibility of relapse is negligible. *Id.* at 52.

### **2. The Individual**

The individual testified that he had used marijuana once in 1994, had disclosed this use to the contractor, and then signed a drug certification in 2001, the year that he was hired by the contractor. *Id.* at 12-13. He testified that he did not use marijuana between 1994 and January 2007. The individual acknowledged that he understood the terms of the drug certification. He responded as follows when asked if he knew that he was still considered employed by the contractor while he was on strike:

Q. Now, when you were out on strike, were you still considered employed by [the contractor]?

A. I guess so, yes.

Q. You were still in status, as far as pay status as far as accruing benefits and longevity with the company and that sort of thing?

A. Yes.

Q. Did you have any question in your mind in terms of whether or not you were still an [name of contractor] employee?

A. No, I pretty much knowed I was still an employee, I just – there were a lot of unclear things at the time really, during that time.

Tr. at 14.

According to the individual, the contractor's union employees went on strike in May 2006, and he believed that he would not be recalled. *Id.* at 10. He had heard rumors that salaried, non-striking workers could replace the union workers and that some of the labor force would be cut permanently. *Id.* at 12. This was the first time that he had participated in a strike. He took a second job while he was out on strike in order to pay his bills.

He did not get the call to return until January 2007. *Id.* He knew that there would be a drug test if he was reinstated, however, he did not think that he would fail the test since it had been two to three weeks prior to his scheduled test date since he had smoked marijuana. *Id.* at 15. In January 2007, he used marijuana between one and five times over a period of two weekends while watching sports. *Id.*

The individual admitted that it was bad judgment to use marijuana. He was unemployed and worried that he would have to look for another job. *Id.* at 19. He has less stress now because his fiancée is working and he is current with bills. *Id.* at 20. He no longer associates with the people who furnished the marijuana in January 2007. He has told them that he cannot be around them when they smoke marijuana. He now acknowledges his bad judgment in not disclosing his marijuana use to his fiancée or union representative prior to taking the drug test. *Id.* at 21. He is in a suspended status with his employer. His access authorization is suspended, not terminated. *Id.* at 24. He was called back at the end of February, worked three days, and he was put on suspension. *Id.* at 26.

### **3. The Individual's Fiancée**

The individual's fiancée testified that she has known the individual for 10 years and that she has been employed by the contractor for five years. *Id.* at 34. She was also out on strike, from May 2006. Even though the strikers voted to return to work in October 2006, she was not recalled until April 2007, two months after the individual was called back. *Id.* at 35. She testified that the employees returned to work at different times.

She was not present when the individual smoked marijuana in January 2007, and was not aware that he had done so until he failed his drug test. *Id.* at 36. She confirmed that the individual had also been laid off from his second job when he was called to return to the contractor and that he "was ready to return to work" after being unemployed. *Id.* She testified that everyone in the union was pretty sure that they would go back to work eventually. *Id.* at 37. The individual had to go for testing the week before training was scheduled. She has not participated in any of the individual's counseling sessions. She does not use marijuana, and does not believe that the individual will do so in the future. *Id.* at 38. She testified that the individual has not been spending time with the same friends and that he spends a lot of his time at home now. He has been upset by the incident and concerned about what people will think of him, but she said that the couple does not feel as much stress as they did in 2006. *Id.* at 40.

#### **D. Mitigating Evidence**

The individual presents some evidence of mitigation of the LSO security concerns. First, he offers the evaluation of a licensed clinical psychologist that states that he has no substance abuse or dependence issues. Further, the psychologist concluded that the individual's drug use was not only isolated, but could be attributed to poor judgment. As further evidence of mitigation, the individual successfully completed the program of therapy sessions required by the company doctor, who found that the individual has a minimal risk of relapse and has learned from the experience. Both the psychologist and the company doctor agreed that the individual's isolated and minimal marijuana use did not meet the requirements for a diagnosis of substance abuse or dependence. There is no evidence in the record that he has used marijuana or any other illegal drug since his last use in January 2007, nine months prior to the hearing. Finally, he has demonstrated his intent not to abuse drugs in the future and has disassociated himself from those friends and acquaintances that use illegal substances. Based on the testimony at the hearing and the demeanor of the individual, I conclude that he is sincerely remorseful for smoking marijuana and that there is little likelihood that this drug use will recur. All of the above partially mitigate the LSO security concerns regarding the individual's drug use and positive drug test.

However, the LSO also raised a concern in the Notification Letter that the individual had violated the terms of the drug certification that he signed in May 2001. By signing that document, the individual promised DOE to avoid using illegal drugs and to avoid knowingly being in the presence of others who are in the possession of illegal drugs while he held a DOE security clearance. Ex. 4. We have in the past found that the violation of a drug certification can be mitigated when an individual does not believe that he or she is still

employed by a contractor and in possession of a valid security clearance. See, e.g., *Personnel Security Hearing*, Case No. TSO-0153, 29 DOE ¶ 82,857 (individual was transferred several times while employer was downgrading and terminating clearances); *Personnel Security Hearing*, Case No. VSO-0307, 27 DOE ¶ 82,837 (2000), *aff'd* (OSA 2000) (summer intern). In this case, some of the strikers were recalled as soon as the strike ended, but the individual was out for three additional months and had begun to fear that he would not be recalled. PSI at 9, 13. However, during the hearing the individual admitted that he knew that he was considered a contractor employee even while he was on strike, and testified that while on strike he continued to accrue the non-pay benefits of a regular employee. Tr. at 14. His fiancée testified that the strikers believed that they would be called back to work eventually. Tr. at 37. Thus, I find that the individual knew that he was still considered a contractor employee and that his drug certification was still valid even while he was on strike.<sup>1</sup> I also considered the fact that the individual did not leave the residence of his friends when he discovered that illegal drugs were on the premises, and he did not report his drug use to his employer later that month when he was recalled to work.<sup>2</sup>

Therefore, based on the above and a review of the record, I find that the individual has not mitigated the Criterion K security concerns related to the violation of his drug certification. See Revised Adjudicative Guidelines at ¶ 25.

### III. Conclusion

After evaluating the evidence in this case, I find that the individual has not mitigated all of the security concerns of Criterion K. 10 C.F.R. § 710.8 (k). Thus, in view of that criterion and the record before me, I cannot conclude that restoring the individual's access authorization would not endanger the common defense and security and would be consistent with the national interest. Accordingly, I find that the individual's access

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<sup>1</sup> In a previous case, an OHA Hearing Officer found that an individual who smoked marijuana during a one year leave of absence from his job successfully mitigated this violation of a drug certification based on several mitigating factors that are not found in the instant case. See *Personnel Security Hearing*, OHA Case No. TSO-0324, 29 DOE ¶ 83,038 (2007). In that case, the individual took leave to care for his dying father and to explore career options that did not require a clearance. He did not intend to return to his job. However, when that individual later decided to return to work, he self-reported his drug use. Two medical experts testified that he was an honest person with a very low probability of relapse who had abstained from drugs for five years by the date of the hearing, even during a very stressful year when he suffered serious health problems. 29 DOE at 86,921. The case currently under review can be distinguished -- the individual clearly wanted to return to his job with the contractor after the strike and he did not self-report his drug use when he was recalled.

<sup>2</sup> I also note that when asked about his sessions with the company doctor, the individual responded that "[w]e're just trying to get the drug out of my system so I can take a reinstatement drug [test], you know. That takes 30 to 45 days." PSI at 25.

authorization should not be restored at this time. Any party may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Valerie Vance Adeyeye  
Hearing Officer  
Office of Hearings and Appeals

Date: February 28, 2008